Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that "in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms . . . of such matter except the document itself." The report was information relating to the commission of an offence which "shall be reduced to writing" pursuant to section 107 of the Criminal Procedure Code (Cap. 6), and section 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary what was set out in writing. Hence it should have remained uncontradicted, on the prosecution evidence, that whoever might have raped the complainant he was certainly not this appellant, as owner of the vehicle M. 7354. Not to put too fine a point on it, one might have thought an inadvertant transposition of one or two digits quite possible and probable due to a genuine lapse of memory, but for the complainant to suggest that she could honestly have believed that "7354" bears any relation whatsoever to "6049" passes all understanding.

In this connection it may further be observed that the learned trial judge "observed the complainant's behaviour in (the identification of the appellant's car) and noted the extreme care she took in scanning the court compound before going up to Exhibit P1 and how she walked around the car and how she paused to see the car from the rear before she identified it" although she had previously identified the same car at the preliminary enquiry. Nevertheless, the judge was "impressed by the extreme care she took before announcing her identification" and such "favourable impression was later on further strengthened by the same care and attention she showed when asked to identify the officer who conducted the identification parade; she was uncertain, and despite several voice tests in court and requests to the officer to remove his cap, and the obvious implication of the identification, remained uncertain and refused to identify this officer". In the result this bit of play-acting created an impression on the judge that she was "a person who would not readily make any allegation or statement of fact uncertain of the truth of the same." Speaking for myself, I think her overacting in these two specific instances are facts which lead me strongly towards a contrary inference.

If she was to be believed *in toto*, then there is no accounting for the serious discrepancies between her evidence and the report she had made to the police. In court her story was that she was throttled into unconsciousness immediately after she was knocked off her bicycle, or after she was overtaken in a short chase of 25 feet — a trifling and immaterial variation of detail — but she knew nothing of what happened thereafter until she came to. On the other hand, the report which she confirmed as correct with her signature reads: "I fell down and he dragged me into the estate. I shouted for help. No one came and that male Chinese held me by the neck and then raped me. I became unconscious . . . At the time the male Chinese raped me he pulled my trousers." There was no mention of throttling or squeezing of her neck. As an unambiguous story, her evidence told of her passing out in the course of the rape; during part of which she was fully conscious and capable of resisting. In her report, however, she had fainted by the bridge 150 yards from the scene of the assault. The two stories are clearly irreconcilable. Finally, three doctors saw no signs of any injury to her neck or throat which could have rendered her speechless and unable to make the complaint herself to her mother for 72 hours.

To avoid undue emphasis on demeanour, it may be well to remember what was said by Lord Wright, and often quoted, from his judgment in *Powell & wife* v. *Streatham Manor Nursing Home,*[8] of the possibility of judges being deceived by adroit or plausible knaves or by apparent innocence.

For the above reasons the appeal was allowed and the conviction quashed.

Appeal allowed.

Solicitors: *N. Sharma.*

SHANGHAI HALL LTD. v. TOWN HOUSE HOTEL LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Raja Azlan Shah J.) January 6, 1967]

[K.L. — Federal Court Civil Appeal No. X.35 of 1966]

Practice and Procedure — R.S.C., 1957, O. 14 r. 6 — Leave to defend — Leave granted on condition of paying $24,000 into court or providing security for same — Triable issue — Nature of counterclaim — No proof of lack of bona fide — Whether unconditional leave should be granted.

The respondents as chief tenants of certain premises claimed against the appellants, their sub-tenants, vacant possession of the said premises, arrears of rent and other reliefs. The appellants contended that the tenancy could only be terminated by a year's notice. They also alleged that the respondents were in breach of a convent in the tenancy agreement and counterclaimed for damages in the sum of $39,000, a sum larger than the respondents' claim. The learned trial judge held that there was only one triable issue before him and that there was no dispute as to the arrears of rent. He therefore gave the appellant leave to defend on payment of $24,000 into court and directed that the counterclaim be disposed of in an independent action.

Held: (1) the learned trial judge after holding that there was one triable issue should have gone further and considered whether the appellant's defence was made in bad faith or whether there were suspicious circumstances in the mode of presenting it or that the defence was a sham; and as there were no such circumstances in this case he should have granted unconditional leave;

(2) the learned trial judge erred in giving undue weight to the alleged admission of arrears of rent without considering the equitable doctrine of set-off;

(3) as the issues raised by the claim and counterclaim in this case arose out of the same subject matter, both the claim and the counterclaim should have been allowed to have been tried together.

Cases referred to:—

(1) *Jacob* v. *Booth's Distillery Co.* (1901), 85 L.T. 262.

(2) *Fieldrank Ltd.* v. *Stein* [1961] 3 All E.R. 681. 683.

(3) *Lloyds Banking Co.* v. *Ogle* (1876), 1 Ex. D. 262, 264.

(4) *Re Judgment Debtor, Ex p. Judgment Creditor* [1934] All E.R. Rep. 688.

(5) *Mondel* v. *Steel* (1841), 8 M. & W. 858.

(6) *Rawson* v. *Samuel*, Cr. & Ph. 161, 178.

(7) *Hanak* v. *Green* [1958] 2 All E.R. 141, 149.

(8) *Ford* v. *Harvey* (1892-1893), 9 P.L.R. 328.

(9) *Morgan & Son* v. *Martin Johnson & Co.* [1948] 2 All E.R. 196.

(10) *Weigall* v. *Waters* (1795), 101 E.R. 663.

(11) *Hart* v. *Rogers* [1916] K.B. 646.

(12) *Surplice* v. *Farnsworth*, 7 Man. & G. 576.

(13) *Gordon* v. *Craddock* [1963] 2 All E.R. 121, 123.

(14) *Gray* v. *Webb*, 21 Ch. D. 802.

(15) *Amon* v. *Bobbett* (1899), 22 Q.B.D. 548, 557.

(16) *Piercy* v. *Young*, 15 Ch. D. 478.

(17) *Baylis Baxter Ltd.* v. *Sabath* [1958] 2 All E.R. 109.

(18) *Jones* v. *Curling*, 13 Q.B.D. 262, 271.

FEDERAL COURT.

R. R. Chelliah (*T. K. Tang* with him) for the appellants.

Kam Woon Wah for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an appeal against an order allowing the appellants to defend the action on condition of paying $24,000 into court and against a further order directing the counterclaim to be disposed of in an independent action.

The respondents are the chief tenant of a six-story building, which I will refer to as the said premises, situated in the heart of Kuala Lumpur. They claim that the appellants are carrying on business on the first floor of the said premises and that they had failed to pay rent for three months in 1965 and that they subsequently through their solicitors gave the appellants notice to quit but the appellants still remain in possession. The respondents therefore claim vacant possession, arrears of rent, double rent, and other consequential reliefs. The appellants by their defence contend that they are carrying on the business of a first-class restaurant and night club on the first floor of the said premises; they admit that they had received the said letter from the respondents' solicitors but contend that the notice is invalid and bad in law. They allege that in pursuance of an oral agreement of August 1964 they became a sub-tenant of the respondents of the first floor of the said premises in consideration of a premium of $7,000 and rent on an ascending scale of $3,000 per month with effect from 21st August 1965. They also claim that there is provision for termination of their sub-tenancy by giving one year's notice in writing, and that there is a covenant

"That the plaintiff (respondents) shall not use or permit or suffer the use of any part of the said premises for the purpose of carrying on the business of a restaurant and/or night club."

The appellants contend that since 1st September 1965 the respondents in breach of the said covenant are using and/or have permitted the use of the mezzanine floor of the said premises for the purpose of carrying on the business of a restaurant under the name and style of Lok Kok Resturant Ltd. They therefore allege that they had thereby suffered heavy loss of profits and they counterclaim for damages in the sum of $39,000, an injunction restraining the respondents from using or permitting the use of the mezzanine floor for the purpose of carrying on the Lok Kok Restaurant and other consequential reliefs. The respondents filed a reply and defence to the counterclaim in which they joined issue with the appellants on their defence. The respondents denied that the first floor was ever sub-let to the appellants for they contend that the original sub-tenant of the said first floor was one Chong Mun Foo who became a director of the appellants and has since retired. They therefore contend that since there was no agreement between the respondents and the appellants the latter are not entitled to restrain the respondents from the lawful use of the mezzanine floor or any other floor as a restaurant.

The respondents filed a notice of motion for final judgment. The motion was supported by the affidavit of the managing director who deposed that the appellants had made default in payment of rent for three months in 1965, they had also failed to pay double rent, and that the appellants are still in possession. The appellants did not file any affidavit. Pausing here for a moment, I agree with the learned judge that omission to file an affidavit in reply was not fatal to the appellants' case as they were not obliged to do that. The learned judge found that there was a triable issue with regard to the relationship of the parties and that in its turn determined the length of notice required to be given to terminate the sub-tenancy. But the learned judge took the view that there was no dispute that rent was in arrears since September 1965 until to-date, that it was a continuing breach, and that there was a long and heavy list of cases

pending in these courts, and in the circumstances he ordered the appellants to provide security in the sum of $24,000 as a condition for leave to defend. He also directed that the counterclaim be disposed of in an independent action.

There are two matters on which little stress has been laid and which seem to deserve a word of notice before I consider the grounds of appeal. Insofar as section 230 of the National Land Code, that is, with regard to an implied agreement on the part of a sub-lessee that he will pay the rent thereby reserved, and section 28 of the Contracts (Malay States) Ordinance, 1950, that is, with regard to agreement in restraint of trade, were relied upon by counsel for the respondents, I regret that my understanding of the law compels me to reject the submissions as being irrelevant for present consideration.

There are several grounds of appeal. However, in my opinion, they can be considered under four heads. Firstly, it was urged upon us that the learned judge had erred in holding that there was one triable issue, that is, the determination of the relationship between the parties. Counsel submitted that there was more than one triable issue of mixed law and fact such as the termination of the sub-tenancy, the length of notice to determine such tenancy, whether there was a provision for re-entry, breach of terms of the contract and equitable set-off. Accordingly, it was submitted that the learned judge erred under a misapprehension of fact and law. The House of Lords case of *Jacob* v. *Booth's Distillery Co.*[1] was cited to us. There the respondents brought an action against the appellant for a sum of money due under a memorandum of charge and two promissory notes signed by him and another co-defendant on the latter's representation that the appellant incurred no liability by signing them. The co-defendant admitted liability. On an application under O. 14 before the master the sum due was ordered to be paid into court, in default judgment would be entered against the appellant. The Order was affirmed by the judge at chambers and by the court of appeal. The House of Lords reversed the decision. The broad principle which is founded on *Jacob's* case is summarised on page 266 of the *Annual Practice* (1963 edn.) in the following terms:—

> "The principle on which the court acts is that where the defendant can show by affidavit that there is a *bona fide* triable issue, he is to be allowed to defend as to that issue without condition."

If that principle is mandatory, then once there is a *bona fide* triable issue the appellants in the present case ought to be given unconditional leave to defend and the appeal should therefore be allowed. However, the learned editors of the *Annual Practice* have this note on page 267:—

> "The condition of payment into court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence or the master 'is prepared very nearly to give judgment for the plaintiff'."

Devlin L.J. in *Fieldrank Ltd.* v. *Stein* [2] quoted the above passage and later referred to a *dictum* of Bramwell B. in *Lloyds Banking Co.* v. *Ogle* [3] that

> "These conditions (of bringing money into court or giving security) should only be applied when there is something suspicious in the defendant's mode of presenting his case."

Devlin L.J. was prepared to accept that there is a present tendency to relax the full rigour of the rule in *Jacobs* v. *Booth's Distillery Co., supra,* but nevertheless was of the view that if there was no sign of bad faith or if the defence raised was not a sham or that there were no suspicious circumstances as to the mode of presenting the case, leave to defend ought not to be made a condition.

In my view the learned judge misjudged the facts and law in holding that there was only one triable issue. After holding that there was a triable issue he ought to go further and consider, in the light of the principle enunciated in *Fieldrank* v. *Stein, supra,* whether the appellants' defence was made in bad faith or whether there were suspicious circumstances in the mode of presenting it or the defence was a sham. In that respect he had clearly erred.

A second ground of appeal raised was that the learned judge erred in law in holding that once there was an alleged admission of arrears of rent the respondents were entitled to possession. Counsel argued that the learned judge ought to have considered the defence as set out in the counterclaim that there was a breach of covenant relating to user of the first floor of the said premises. Several authorities were cited by both counsel. Before dealing with them it is necessary to say something in general with regard to the historical background of "set-off" and "counterclaim" which were canvassed before us at some length. With regard to the word "set-off", Lord Hanworth M.R. in *Re A Judgment Debtor, Ex parte Judgment Creditor* [4] said:—

> "That is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set-off."

Before 1873 a set-off could only be raised at law by a cross-claim which had to be advanced by a separate action. However, there were circumstances where a defendant could, without bringing a separate action, set up certain contentions by way of defending the plaintiff's claim against him. The way which the matter developed was explained by Parke B. in his judgment in *Mondel* v. *Steel,*[5] and on page 871 he said:—

> "It must however be considered, that in all those

cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more."

Also, before 1873, a court of equity in certain circumstances would restrain a plaintiff in an action at law pending an order of the court or might restrain him from levying execution on a judgment obtained in his favour until the further order of the court. The principle on which a court of equity proceeded was where the person who came to equity could show some equitable ground for being protected against his adversary's claim. Lord Cottenham L.C. made that clear in 1841 in his judgment in *Rawson* v. *Samuel* [6] where, after examining the reported cases dealing with what he said was "familiarly" spoken of as "equitable set-off", he came to the conclusion that what had to be established was that there was an equity which went to impeach "the title to the legal demand."

After the Judicature Acts it was no longer necessary for a defendant to bring a separate action if he had a cross-claim. He could present his cross-claim in the existing action brought against himself. So a counterclaim becomes possible. Furthermore, equitable defences could be relied upon in actions at law. Broadly speaking, it is true to say that any right which could be asserted and protected in the Court of Chancery can now be enforced in a case brought in any division of the High Court, so that all matters in controversy, legal or equitable, can completely and finally be determined in one action. Lord Cairns, when speaking of the new Supreme Court, remarked:—

"This court is now not a court of law nor a court of equity but a court of complete jurisdiction."

Morris L.J. neatly summarises the fusion of law and equity in *Hanak* v. *Green* [7] and on pages 149-150 he said:—

"Since the passing of the Judicature Acts it is clear that reliance may be placed in any court on any equitable set-off that formerly could have been asserted in a court of equity; furthermore, counterclaims may be presented and there is no need to advance cross-claims in a separate action. But it is not the case that every cross-claim may be presented as a set-off, even if in amount it equals or overtops the claim. Nor does the mere fact that the cross-claim is in some way related to the transaction which gave rise to the claim serve to invest the cross-claim with the quality of set-off.

The position is, therefore, that since the Judicature Acts there may be (i) a set-off of mutual debts, (ii) in certain cases a setting up of matters of complaint which if established reduce or even extinguish the claim, and (iii) reliance on equitable set-off and reliance as a matter of defence on matters of equity which formerly might have called for injunction or prohibition. The basis of (i) was explained in *Stooke* v. *Taylor* (1880), 5 Q.B.D. 569, in which case Cockburn C.J. pointed out (*ibid.*, at p. 576) that in the case of a set-off, the existence and the amount of a set-off must be taken to be known to a plaintiff who should give credit for it in his action against the defendant. He pointed out that that reasoning did not apply to a counterclaim, which to all intents and purposes is an action by the defendant against the plaintiff and in which the claims are not confined to debts or liquidated damages.

The cases within group (ii) are those within the principle of *Mondel* v. *Steel*, to which I have referred. The cases within group (iii) are those in which a court of equity would have regarded the cross-claim as entitling the defendant to be protected in one way or another against the plaintiff's claim."

And on page 151 he said:—

"I consider that a cross-claim can be regarded as a set-off if in a court of law it would have been so regarded at the time of the Judicature Acts or if it would have been regarded by a court of equity as the basis for equitable set-off for giving protection on equitable grounds to a defendant."

Counsel for the appellants referred us to the case of *Ford* v. *Harvey*.[8] In that case the attorney (since deceased) assigned his practice to the defendants, a firm of solicitors, to be paid by instalments and covenanting, *inter alia*, that so long as the firm should duly make their payments he would not at any time practice, directly or indirectly, as a solicitor. Instalments had fallen due, the plaintiff's executors brought an action to recover the arrears of instalments and applied for summary judgment under O. 14, whereas the defendants set up violations of the covenants on the attorney's part by way of defence and counterclaim. The judge at chambers allowed the defendants to defend only on condition of paying the amount of arrears of instalments into court, against which the defendants appealed. Lord Coleridge in giving judgment said that once there was a *bona fide* counterclaim and defence it was not necessary to decide whether and how far those were well founded. The order of the judge at chambers was reversed. The next case referred to was *Jacobs* v *Booth's Distillery Co., supra,* to which reference has been made earlier in the judgment. Next, *Morgan & Son* v. *Martin Johnson & Co.*[9] was cited. In that case the plaintiffs claimed by specially endorsed writ, charges for storage of vehicles, and telephone calls. The defendants admitted the claim but contended that due to the plaintiffs' negligence as bailees one of the vehicles was lost. The plaintiffs were given leave to sign final judgment on their claim under O. 14 with a stay of execution pending trial of the defendants' counterclaim. On appeal it was held that the case was one in which a court of equity would have allowed the defendants relief by way of equitable set-off and the proper order was that they should be given

unconditional leave to defend. Counsel also relied on the case of *Hanak* v. *Green, supra.* Briefly, the plaintiff in that case brought an action for damages against the defendant, a builder, for failure to complete certain work in time and for bad workmanship. In his defence the defendant said he would "if necessary seek to set up (his counterclaim) by way of set-off in extinction or in diminution of the plaintiff's claim" and he successfully counterclaimed (1) for extra work ordered and done, (2) for refusal of access to the defendant's workmen, and (3) for damages for trespass to the defendant's tools. The case went on appeal with regard to costs with which we are not concerned. Counsel for the respondents strongly relied on the case of *Weigall* v. *Waters.*[10] It was an action at law for rent brought by the landlord against his tenant and it was held that the tenant could not set off any uncertain damages that he might be entitled to recover against the landlord on any of the covenants in the lease. Lord Kenyon said that if the plaintiff had fairly laid out money on repairing, perhaps a court of equity would grant him relief. In *Hart* v. *Rogers,*[11] another case relied on by the respondents, it was held that a claim for damages for breach of covenant could not be set-off against a claim for rent.

I do not propose to follow the fortunes of *Hart* v. *Rogers;* few cases can have lived so dangerously and lived so long. In *Hart* v. *Rogers,* Scrutton J. seemed to follow the case of *Surplice* v. *Farnsworth,*[12] where it was held that breach of a covenant to repair on the part of a landlord was no defence to a claim for rent but a matter of cross-action. *Surplice* v. *Farnsworth* was decided before the Judicature Acts, but since the Acts, the case could have been proceeded on the basis that a Court of Chancery would have recognised an equitable set-off. Therefore, *Hart* v. *Rogers* is now doubted since it was decided without considering the effect of the Judicature Acts. (See also *Annual Practice,* 1963 edn., on page 451). *Weigall* v. *Waters, supra,* decided in 1795 must now be received with reservation as it is out of the current of contemporary thought.

In view of the modification of the common law rule with regard to set-off by legislation, set-off can now be pleaded in respect of mutual debts or such matters or complaints as are allowable to reduce or extinguish the claim or other matters of equity which formerly might have called for injunction or prohibition. That aspect of set-off as developed by the Judicature Acts should have been taken into account when considering the plaintiff's claim for arrears of rent. The learned judge gave undue weight to the alleged admission of arrears of rent without considering the equitable doctrine of set-off and, in my opinion, he was wrong. *Morgan & Son* v. *Martin Johnson & Co., supra,* and *Hanak* v. *Green, supra,* seem to be authorities that are closely applicable to the present case.

The third ground of appeal was that the learned judged was wrong when he directed his mind to the long and heavy list of cases pending in the courts as one of the reasons for giving conditional leave to defend. I am unable to agree that that reason can support the finding of the learned judge so as to make it an unassailable finding of law. Without citing authorities, I venture to express the view that such a reason can never constitute a valid ground for giving judgment to the detriment of a litigant. To do so would be a contumacious disregard of all that the court stands for.

That brings me to the question that has to be decided in this appeal, that is, the circumstances on which a court of appeal will interfere with the exercise of discretion by the judge below under O. 14 r. 6, giving the appellants conditional leave to defend. As a rule, a court of appeal is slow to interfere with the exercise of discretion by the judge below unless there are some special circumstances such as some error of principle or misapprehension of fact on his part or giving undue weight to a particular aspect of the facts. It is sufficient to refer in this connection to *Gordon* v. *Craddock* [13] and to quote the words of Willmer L.J.:—

> "It appears to me that the question what terms ought to be imposed on a defendant as a condition of giving him leave to defend is very much a matter of discretion for the judge. That being so, this court is naturally reluctant to interfere with the exercise of discretion by the judge below unless it can be shown that there has been some error of principle on his part, or that he has in some way misapprehended the facts, or has given undue weight to this or that aspect of the facts."

Applying this principle to the present case, I find it impossible to avoid the conclusion that the learned judge not only erred in law with regard to the applicability of the doctrine of equitable set-off and misjudged the facts and law that there was only one triable issue but gave undue weight to the alleged admission of arrears of rent. In the circumstances this court feels bound to interfere with the exercise of the learned judge's discretion.

I next come to the last ground of appeal, that is, the learned judge ought not to have directed that the counterclaim be dealt with in an independent action. It was also submitted that the learned judge gave no reasons for his decision. It is clear from the record that the learned judge made the order in pursuance of an application by the then counsel for the respondents under O. 21 r. 15, and the case of *Gray* v. *Webb* [14] was relied in support. In that case a counterclaim was excluded on the ground that it would unduly delay the plaintiff's action. Before us, the case of *Amon* v. *Bobbett* [15] was relied upon. There the plaintiff succeeded on his

claim and on the counterclaim. He was awarded costs on the county court scale on both the claim and counterclaim and the case went on appeal on the basis that the plaintiff was entitled to costs on the High Court scale on the counterclaim. Lord Esher M.R. in his judgment said that the claim and counterclaim must, although they were included in one action, be treated for the purposes of taxation as separate actions, and that being the case, the counterclaim could not be within O. 65 r. 12. Bowen L.J. (on p. 548) said that

> "A counter-claim is therefore to be treated, for all purposes for which justice requires it to be so treated, as an indepedent action."

That passage has been cited verbatim in the *Annual Practice* (1963 edn. pp. 452-453) and in *Mallal's* Supreme Court Practice (at p. 290). That was the passage adopted by counsel. If *Amon* v. *Bobbett, supra,* was advanced as a proposition that the appellant's counterclaim should be dealt with in an independent action, I can find no justification for that contention. That case merely propounds the law in general terms. To say that that case laid down the proposition that in this or in any other case a counterclaim must be dealt with in an independent action is not only to run counter to the decision in that case but also to fetter the exercise of discretion conferred by O. 21 r. 15. I accept *Amon* v. *Bobbett, supra,* insofar as it elucidates the general principle that a counterclaim is an independent action. The essential difference between a counterclaim and a set-off is that a counterclaim does not operate merely as a defence but as an independent action enabling the defendant to obtain a julgment against the plaintiff and to recover any balance due to him or any other relief to which he is entitled. Since it is an independent action, the defendant may prosecute it although the plaintiff's action is for some reason stayed, discontinued, or dismissed (O. 21 r. 16). It is not so with set-off because it is merely a defence and not an independent action and therefore the defendant cannot claim to have his set-off tried if for some reason the plaintiff's claim is discontinued. See *Stooke* v. *Taylor, supra.*

It was said in *Piercy* v. *Young* [16] that where the issues raised by the claim and counterclaim arose out of the same subject matter, both the claims should be tried together as that was the defendant's object in pleading the counterclaim. Separate trials on separate issues are nearly as expensive as separate actions and ought certainly not to be encouraged, and they should only be granted on special grounds. Parker L.J. (as he then was) in *Baylis Baxter Ltd.* v. *Sabath* [17] seems to be of the view that where the counterclaim amounts to an equitable set-off it is right that the judge should deal with the claim and counterclaim as one. *Odgers* on Pleading & Practice (18th edn.) on page 215 states:—

> "If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him now to bring a cross-action, unless his counterclaim be of such a nature that it cannot conveniently be tried by the same tribunal or at the same time as the plaintiff's claim."

To my mind those are observations which may influence a judge in the exercise of his discretion under O. 21 r. 15. They cannot be said to lay down any principle whatever, for once a principle is laid down, it ceases to be a discretion and becomes a rule of law. As was said by Brown L.J. in the case of *Jones* v. *Curling*:— [18]

> "I have always entertained the strongest opinion that the court would be acting *ultra vires* if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or Judicature rule which creates the discretion gives it in ample and unqualified terms."

Had the learned judge given reasons for his decision, I might have been prepared to agree with him. But since no reason was given it is difficult to escape from the conclusion that he had arrived at his decision arbitrarily.

Giving the best consideration I can in the matter, in the absence of any reason given by the learned judge, I am of the opinion that this is a proper case to exercise the discretion in favour of the appellants for ordering the counterclaim to be disposed of in the same action as that of the respondents. I would therefore allow the appeal with costs. That means the appellants are given unconditional leave to defend and to prosecute their counterclaim in the same action as the respondents' claim.

Barakbah L.P. and **Azmi C.J.** concurred.

Appeal allowed.

Solicitors: *R. R. Chelliah Bros.; Kam Woon Wah & Co.*

CHOW SIEW WOH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) January 7, 1967]

[K.L. — Federal Court Criminal Appeal No. X.34 of 1966]

Criminal Law and Procedure — Evidence — Dying statement — Not produced at trial — Misdirection — Criminal Procedure Code (S.S. Cap. 21), s. 124(3).

Penal Code, s. 32 — Murder — Misdirection or non-direction.

This was an appeal against the conviction of the appellant for murder. The deceased made a dying statement which was recorded by the police but this was not produced in evidence. It was also alleged on appeal that the trial judge had misdirected the jury on an alleged suicide attempt by the appellant, when the evidence did not support the allegation.

Held: because of the misdirection or non-direction as to the alleged suicide attempt and the non-production of the best available evidence, to wit, the dying statement, the verdict of the lower court cannot stand and the conviction must be quashed.